

OPINION
51-79

July 16, 1951 (OPINION)

HIGHWAYS

RE: Rights of Abutting Owner

Yours of the twelfth inst. has been received. In this letter you state that the following situation has arisen in your county:

One of the townships of this county complains that owners of land abutting township roads are making use of the ditches of said roads in their private drainage systems. In so doing the ditches are being deepened and the board of supervisors feel that this will eventually be harmful to the road.

The question arises as to whether the abutting owner may make such use of the ditches of the roads in question."

We wish to commend you for having studied the question and giving us a lead to the pertinent authorities. This has helped us very materially.

The general rule as to the rights of an abutting owner is, we believe, stated in the syllabus to the case of *Town of Hudson v. Carrithers*, 201 Ill. App. 153, as follows:

The owner of the fee in a public highway outside of an unincorporated city or village has a right to use said highway for any purpose of his own not incompatible with the free, safe, and convenient use thereof for public travel thereon."

The case of *Holm v. Montgomery*, 62 Wash. 398, 34 L.R.A.N.S. 506, 113 Pac. 1115, is directly in point. In the syllabus of this case as found in 113 Pac. 1115, we find the rule stated as follows:

Since the public has only an easement of use in a highway, and the fee vests in the abutting owner, who may make such use of the land within the highway as will not interfere with its use by the public, such owner may use the highway on which to maintain ditches for the benefit of his land, provided he does so without creating a nuisance or interfering with its use as a highway."

This case is annotated in 34 L.R.A. 506, giving cases supporting this rule. Other cases may be found in Key numbered digests under subject "Highways Key No. 89." See also 39 C.J.S. P. 1084.

The general rule in this state is that the abutting owner owns to the center of the highway and these authorities apply only to cases where the abutting owner does own to the center of the highway. There are cases where the public has acquired the fee to the land upon which the highway is constructed, and, of course, these rules will not apply there.

It is, therefore, in every case a question as to whether the use to which the abutting owner seeks to put the untraveled portion of the highway does or does not interfere with the public use of it.

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